

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SEAN C. McCONNELL,)	Case No. EDCV 08-667 JC
Plaintiff,)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
Defendant.)	

I. SUMMARY

On May 23, 2008, plaintiff Sean McConnell (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have filed a consent to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; June 2, 2008 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
 2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
 3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
 5 **DECISION**

6 On April 15, 2005, plaintiff filed an application for Supplemental Security
 7 Income benefits. (Administrative Record (“AR”) 10, 52, 57). Plaintiff asserted
 8 that he became disabled on May 27, 2004, due to constant pain and partial use of
 9 his hand. (AR 52, 62). The ALJ examined the medical record and heard
 10 testimony from plaintiff (who was represented by counsel) and a vocational expert
 11 on February 5, 2007. (AR 321-37). At a supplemental hearing on August 6, 2007,
 12 the ALJ heard further testimony from plaintiff, and ordered a consultative
 13 neurological examination of plaintiff. (AR 338-46). At a supplemental hearing on
 14 February 6, 2008, the ALJ heard testimony from a different vocational expert.
 15 (AR 347-54).

16 On March 10, 2008, the ALJ determined that plaintiff was not disabled
 17 through the date of the decision. (AR 16). Specifically, the ALJ found:
 18 (1) plaintiff suffered from the following severe impairments: Nerve and tendon
 19 injury of the right arm with residual pain (AR 12); (2) plaintiff did not have an
 20 impairment or combination of impairments that met or medically equaled one of
 21 the listed impairments (AR 12); (3) plaintiff could perform light work² (AR 12);
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23
 24 ¹The harmless error rule applies to the review of administrative decisions regarding
 25 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
 26 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
 application of harmless error standard in social security cases).

27 ²Specifically, the ALJ determined that plaintiff (i) could lift and carry 20 pounds
 28 occasionally and 10 pounds frequently; (ii) could stand and/or walk eight hours out of an eight-
 hour work day; (iii) could sit for eight hours in an eight-hour work day for two hours at a time;
 (continued...)

(4) plaintiff has no past relevant work (AR 15); (5) there are jobs that exist in significant numbers in the national economy that plaintiff could perform (AR 15-16); and (6) plaintiff's allegations regarding his limitations were not credible to the extent they were inconsistent with the ALJ's residual functional capacity assessment (AR 14).

The Appeals Council denied plaintiff's application for review. (AR 3-5).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that he is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

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²(...continued)

(iv) could occasionally reach overhead and in all directions with the right hand; (v) was precluded from handling, fingering, feeling, pushing or pulling with the right hand; and (vi) could frequently reach overhead, in all directions, and handle, finger, feel, push and pull with the left hand. (AR 12-13).

1 (2) Is the claimant's alleged impairment sufficiently severe to limit
2 his ability to work? If not, the claimant is not disabled. If so,
3 proceed to step three.

4 (3) Does the claimant's impairment, or combination of
5 impairments, meet or equal an impairment listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1? If so, the claimant is
7 disabled. If not, proceed to step four.

8 (4) Does the claimant possess the residual functional capacity to
9 perform his past relevant work? If so, the claimant is not
10 disabled. If not, proceed to step five.

11 (5) Does the claimant's residual functional capacity, when
12 considered with the claimant's age, education, and work
13 experience, allow him to adjust to other work that exists in
14 significant numbers in the national economy? If so, the
15 claimant is not disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

18 The claimant has the burden of proof at steps one through four, and the
19 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
20 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679
21 (claimant carries initial burden of proving disability).

22 **B. Standard of Review**

23 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
24 benefits only if it is not supported by substantial evidence or if it is based on legal
25 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
26 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
27 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable
28 mind might accept as adequate to support a conclusion." Richardson v. Perales,

1 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
 2 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
 3 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

4 To determine whether substantial evidence supports a finding, a court must
 5 “consider the record as a whole, weighing both evidence that supports and
 6 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
 7 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
 8 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
 9 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
 10 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

11 **IV. DISCUSSION**

12 **A. The ALJ Properly Considered Testimony From a Second** 13 **Vocational Expert**

14 **1. Pertinent Facts**

15 At the February 5, 2007, hearing, the ALJ posed the following hypothetical
 16 question to a vocational expert (“VE #1”):

17 Assuming that we have an 18 year old adult with no past
 18 relevant work experience. . . . [¶][¶] Eleven years of education with
 19 some college units. And that person has the following residual
 20 functional capacity, can lift occasionally 20 pounds, frequently ten
 21 pounds. Can stand and walk six plus six hours sitting out of an eight
 22 hour day with no difficulty. Push and pull with the left upper
 23 extremity and both lower extremities only. The lifting will be
 24 primarily left upper extremities. The right for balancing some objects
 25 but not lifting. No ladders, ropes or scaffolds. Occasional climbing,
 26 balancing, stooping, kneeling, crouching and crawling. The person
 27 should not be doing any reaching either overhead or even at shoulder
 28 length, shoulder height with the right upper extremity. That also

1 limits the right upper extremity to no handling or gross manipulation,
 2 no fingering and no feeling.
 3 (AR 333-34).

4 VE #1 testified that there were no jobs available in the national economy for
 5 such a person.³ (AR 334). At the end of the hearing, the ALJ held the record open
 6 so plaintiff could provide additional medical records pertaining to plaintiff's right
 7 arm. (AR 324, 335-36).

8 At the August 6, 2007 supplemental hearing, the ALJ noted that subpoenaed
 9 medical records had not yet been received, that the record of plaintiff's physical
 10 therapy was incomplete, and that the record lacked current medical opinions
 11 regarding plaintiff's abilities. (AR 340-41). The ALJ also stated that he had "no
 12 faith" in the testimony from VE #1 that there were no jobs available for a person
 13 like plaintiff who has little or no use of one arm. (AR 343). Consequently, the
 14 ALJ ordered a consultative neurological examination of plaintiff. (AR 343, 345-
 15 46).

17 ³When the ALJ asked VE #1 to explain her findings, the following exchange ensued:

18 [VE #1] Considering that the gentleman was right-hand dominant,
 19 initially, there would be a [] few positions available that actually [sic] high school,
 20 such as a surveillance system monitor. Those numbers are not available for
 someone that does not have a high school diploma.

21 [ALJ] Is that the only position that would be available?

22 [VE #1] Well, I considered usher. However, ushers, and I did some
 23 research on this over the last couple years for my own casework, ushers actually
 empty trash. Or I was considering ticket taker. But - -

24 [ALJ] . . . I'm kind of astonished because I know semi-truck drivers that
 25 have no right arm and they drive trucks and they still get a license. I know a
 police officer that has no right arm, that is a police officer. Fully certified and
 works every day.

26 [VE #1] And I, and I too, I had a one-armed gentleman on my caseload
 27 [who] was required special accommodations to actually fit the truck. I had a
 client that worked at a truck stop in Barstow with one arm, but that was with
 special accommodations.

28 [ALJ] Okay.

(AR 334-35).

1 At the February 6, 2008 supplemental hearing, the ALJ posed the following
2 hypothetical question to a different vocational expert (“VE #2”):

3 I want you to assume [an] . . . 18-year-old individual with an
4 eleventh grade, I believe twelfth grade by now, education. That
5 person has the following limitations[:] Can frequently lift up to 10
6 pounds, occasionally up to 20 pounds; can carry the same amount of
7 weight that I just gave you. That person can sit up to two hours at a
8 time, but eight hours maximum in a day; there is no limitation of him
9 standing or walking. With the right hand that person can reach only
10 occasionally overhead and in all directions, but cannot handle, finger,
11 feel, or push and pull with the right upper extremity or hand; the left
12 hand is frequent use in all areas, reaching[,] handling, fingering,
13 feeling, pushing and pulling; push and pull is within the weight limits
14 I gave you. Can occasionally climb ladders and scaffolds, but
15 frequently can do other climbing, balancing, stooping, kneeling,
16 crouching, and crawling. Can work at unprotected heights on a
17 frequent basis and around moving mechanical parts, as well as
18 operating a motor vehicle. Frequently can work with humidity and
19 wetness changes. I see nothing in the record to support any
20 limitations on dust, odors, fumes, or pulmonary irritants. Can
21 occasionally be exposed to extreme cold, but frequently in extreme
22 heat, and occasionally can be exposed to vibrations. Would there be
23 jobs for that individual?

24 (AR 350-51).

25 VE #2 testified that such an individual could work as a host in a restaurant
26 or dance hall and as an usher. (AR 351-52). VE #2 testified that the number of
27 usher jobs available needed to be discounted by 50 percent to account for
28 plaintiff’s right-hand limitation, stating the following reasons: “The statistics that

1 I have lump [the usher] position with lobby attendants and ticket takers. And with
2 the right-handed limitation, lobby attendants and ticket takers would be precluded
3 because [plaintiff] wouldn't have that bilateral function." (AR 352). VE #2
4 testified that plaintiff (who was originally right-handed) could also work as an
5 information clerk since he had learned to write with his left hand. (AR 353-54).

6 **2. Analysis**

7 Plaintiff contends that the ALJ improperly sought testimony from a second
8 vocational expert in order to justify a finding that plaintiff was not disabled.
9 (Plaintiff's Motion at 3, 4). Plaintiff is not entitled to a reversal or remand based
10 upon this contention.

11 First, plaintiff provides no evidence to support his argument that the ALJ
12 sought testimony from a second vocational expert merely because the ALJ was
13 "dissatisfied" with the testimony VE #1 provided at the February 5, 2007 hearing.
14 (Plaintiff's Motion at 3). To the contrary, the transcript of the August 6, 2007
15 supplemental hearing reflects that the ALJ reasonably considered the record
16 inadequate to allow for proper evaluation of the evidence, and thus appropriately
17 held the record open so plaintiff could provide additional medical evidence, and so
18 a consultative neurological examination could be conducted. (AR 340-41, 343,
19 345-46). While the ALJ was openly skeptical regarding VE#1's testimony, there is
20 no evidence that the use of a different vocational expert at the August 6 hearing
21 was anything other than a "consequence of the continued hearing." (Defendant's
22 Motion at 4). Plaintiff cites no legal authority that prohibits an ALJ from seeking
23 additional vocational expert testimony at a supplemental hearing after the record
24 has been adequately developed.

25 Second, to the extent plaintiff suggests that the ALJ was biased, such a
26 contention is unsupported. ALJs and similar administrative adjudicators are
27 presumed to exercise their decision-making authority with honesty and integrity.
28 See Schweiker v. McClure, 456 U.S. 188, 195-196 (1982); Withrow v. Larkin, 421

1 U.S. 35, 47 (1975); Rollins v. Massanari, 261 F.3d 853, 857-58 (9th Cir.2001)
 2 (citing Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999)). To rebut such a
 3 presumption, the plaintiff has the burden to show that the ALJ's conduct, in the
 4 context of the whole case, was "so extreme as to display clear inability to render
 5 fair judgment." Rollins, 261 F.3d at 858 (internal quotation marks omitted)
 6 (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)); Verduzco, 188 F.3d
 7 at 1089 (citation and internal quotation marks omitted) ("This presumption can be
 8 rebutted by a showing of conflict of interest or some other specific reason for
 9 disqualification."). Plaintiff's unsupported allegation that the ALJ was vocational
 10 expert "shopping" does not come close to meeting his high burden in establishing
 11 bias.

12 Accordingly, a reversal or remand on this basis is not warranted.

13 **B. The ALJ Properly Concluded That Plaintiff Could Perform**
 14 **Other Work That Exists in Significant Numbers in the National**
 15 **Economy**

16 Plaintiff contends that the ALJ's step five determination is erroneous and
 17 warrants a reversal or remand. While this Court agrees that the ALJ incorrectly
 18 adopted what he mischaracterized as VE#2's testimony that plaintiff could work as
 19 a lobby attendant or ticket taker, the Court finds no material error in the ALJ's step
 20 five determination as the ALJ's determination that plaintiff could perform other
 21 jobs that exist in significant numbers in the national economy – namely, host at a
 22 restaurant or dance hall, or information clerk – is free from material error and
 23 supported by substantial evidence.

24 **1. Background**

25 As noted above, VE#2 testified that plaintiff (or a hypothetical person with
 26 plaintiff's characteristics) could work as a host in a restaurant or dance hall
 27 (55,000 California positions; 385,000 national positions), as an usher (8,000
 28 California positions; 56,000 national positions), and as an information clerk

1 (10,000 California positions; 99,000 national positions). (AR 351-52, 353-54). In
2 discussing the number of such available jobs, VE #2 noted that the statistics he
3 had regarding the number of usher jobs lumped such job with that of lobby
4 attendants and ticket takers – jobs which plaintiff could *not* do because of his right
5 hand limitations. (AR 352). Because of the foregoing, VE#2 indicated that the
6 statistics above regarding usher positions incorporated a 50% erosion from the
7 larger combined figure reflecting the number of positions for ushers, lobby
8 attendants and ticket takers. (AR 352). VE#2 indicated that his testimony was
9 consistent with the Dictionary of Occupational Titles (“DOT”).

10 In his decision, the ALJ indicated that VE#2 had testified that a hypothetical
11 individual with plaintiff’s residual functional capacity could work as a host for a
12 restaurant or dance hall, as an usher (lobby assistant or ticket taker), and as an
13 information clerk, and recited the above-referenced statistics regarding the number
14 of positions. (AR 16). Based expressly on VE#2’s testimony, the ALJ concluded
15 that plaintiff could perform work that exists in significant numbers in the national
16 economy. (AR 16).

17 **2. Pertinent Law**

18 As noted above, at step five, the Commissioner must show that a claimant
19 can perform some other work that exists in “significant numbers” in the national
20 economy (whether in the region where such individual lives or in several regions
21 of the country), taking into account the claimant’s residual functional capacity,
22 age, education, and work experience. Tackett, 180 F.3d at 1100 (citation omitted);
23 42 U.S.C. § 423(d)(2)(A). The Commissioner may satisfy this burden, depending
24 upon the circumstances, by the testimony of a vocational expert or by reference to
25 the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
26 Appendix 2 (commonly known as “the Grids”). Osenbrock v. Apfel, 240 F.3d
27 1157, 1162 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1100-1101).

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1 The vocational expert's testimony may constitute substantial evidence of a
 2 claimant's ability to perform work which exists in significant numbers in the
 3 national economy when the ALJ poses a hypothetical question that accurately
 4 describes all of the limitations and restrictions of the claimant that are supported
 5 by the record. See Tackett, 180 F.3d at 1101; see also Robbins, 466 F.3d at 886
 6 (finding material error where the ALJ posed an incomplete hypothetical question
 7 to the vocational expert which ignored improperly-disregarded testimony
 8 suggesting greater limitations); Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001)
 9 ("If the record does not support the assumptions in the hypothetical, the vocational
 10 expert's opinion has no evidentiary value.").

11 ALJs routinely rely on the DOT "in determining the skill level of a
 12 claimant's past work, and in evaluating whether the claimant is able to perform
 13 other work in the national economy." Terry v. Sullivan, 903 F.2d 1273, 1276 (9th
 14 Cir. 1990) (citations omitted). The DOT is the presumptive authority on job
 15 classifications. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ
 16 may not rely on a vocational expert's testimony regarding the requirements of a
 17 particular job without first inquiring whether the testimony conflicts with the
 18 DOT, and if so, the reasons therefor. Massachi v. Astrue, 486 F.3d 1149, 1152-53
 19 (9th Cir. 2007) (citing Social Security Ruling 00-4p).⁴ In order for an ALJ to
 20 accept vocational expert testimony that contradicts the DOT, the record must
 21 contain "persuasive evidence to support the deviation." Pinto v. Massanari, 249
 22 F.3d 840, 846 (9th Cir. 2001) (quoting Johnson, 60 F.3d at 1435). Evidence
 23 sufficient to permit such a deviation may be either specific findings of fact
 24 regarding the claimant's residual functionality, or inferences drawn from the
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26
 27 ⁴Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903
 28 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social
 Security Administration and are entitled to some deference as long as they are consistent with the
 Social Security Act and regulations. Massachi, 486 F.3d at 1152 n.6.

1 context of the expert's testimony. Light v. Social Security Administration, 119
2 F.3d 789, 793 (9th Cir.), as amended (1997) (citations omitted).

3. Analysis

4 Plaintiff contends that the ALJ's determination at step five that plaintiff
5 could perform the jobs of host, ticket taker, and information clerk, is erroneous
6 because the requirements of each such job exceed plaintiff's abilities. (Plaintiff's
7 Motion at 4-6). As plaintiff notes, the DOT states that the positions of Host and
8 Ticket Taker require frequent reaching and handling and occasional fingering, and
9 the position of Information Clerk requires occasional reaching and handling.
10 (Plaintiff's Motion at 5) (citing DOT §§ 310.137-010 [Host/Hostess, Restaurant];
11 349.667-010 [Host/Hostess, Dance Hall]; 344.667-010 [Ticket Taker]; 237.367-
12 022 [Information Clerk]). Plaintiff argues that such requirements exceed his
13 abilities because, as the ALJ noted in determining residual functional capacity,
14 plaintiff is limited "to only occasionally reach overhead and in all directions with
15 the right hand" and "precluded from handling, fingering, feeling, pushing or
16 pulling with the right hand." (Plaintiff's Motion at 5).

17 With respect to the job of ticket taker, the Court finds the ALJ's
18 determination that plaintiff could perform such job unsupported by substantial
19 evidence. VE#2 expressly excluded such job from his opinion because it required
20 "bilateral function" which the hypothetical claimant did not possess. (AR 352).
21 Nonetheless, the ALJ's error is harmless since, as discussed below, the ALJ
22 determined plaintiff could perform other jobs identified by the vocational expert.

23 With respect to the positions of host and information clerk, the ALJ's step
24 five determination that plaintiff could perform such jobs is supported by
25 substantial evidence. The Court finds no actual conflict between plaintiff's
26 abilities and the DOT requirements identified for such jobs. While the two
27 challenged jobs do require, *inter alia*, frequent or occasional reaching, handling
28 and/or fingering, plaintiff has no significant limitations in the use of his left arm

1 and hand, and thus would be capable of performing such requirements. The
2 vocational expert confirmed as much when he testified that such jobs could be
3 performed consistent with DOT requirements in spite of plaintiff's right arm
4 limitations. (AR 352).

5 Plaintiff's conclusion that the positions of host and information clerk exceed
6 his abilities is erroneously premised on the assumption that the reaching, handling
7 and fingering required by such jobs necessarily involves the use of both hands.
8 However, the DOT does not expressly contain such a requirement. See, e.g.,
9 Carey v. Apfel, 230 F.3d 131, 146 (5th Cir. 2000) (person with use of one arm
10 could perform the jobs of cashier and ticket taker, even though jobs required
11 fingering and handling abilities; DOT does not contain requirement of bilateral
12 fingering and fingering); Feibusch v. Astrue, 2008 WL 583554, *5 (D. Haw.
13 Mar. 4, 2008) (citations omitted) ("[T]he use of two arms is not necessarily
14 required for jobs that require reaching and handling."); Diehl v. Barnhart, 357 F.
15 Supp. 2d 804, 822 (E.D. Pa. 2005) (person with limited use of one arm could
16 perform jobs requiring frequent reaching, handling, and fingering, and therefore
17 there was no conflict between DOT and vocational expert's testimony to that
18 effect).

19 Moreover, since the DOT does not expressly state that the jobs of host and
20 information clerk can be performed by a claimant who lacks the use of one arm,
21 the ALJ appropriately obtained the testimony of a vocational expert to assist in the
22 step five determination. See Carey, 230 F.3d at (Resolution of "factual
23 disagreement about whether a person with one arm can perform a job requiring
24 some degree of manual dexterity and fingering . . . requires expert testimony" from
25 a vocational expert); Fuller v. Astrue, 2009 WL 4980273, *3 (C.D. Cal. Dec. 15,
26 2009) (Where nature of particular action required in performance of job not
27 specified in DOT, ALJ may properly rely on testimony from vocational expert to
28 determine whether claimant can perform job in question despite claimant's

1 limitations); see also SSR 85-15 (“Reaching (extending the hands and arms in any
 2 direction) and handling (seizing, holding, grasping, turning or otherwise working
 3 primarily with the whole hand or hands) are activities required in almost all jobs.
 4 Significant limitations of reaching or handling, therefore, may eliminate a large
 5 number of occupations a person could otherwise do. Varying degrees of
 6 limitations would have different effects, and the assistance of a [vocational expert]
 7 may be needed to determine the effects of the limitations.”). The ALJ posed a
 8 hypothetical question to VE #2 which included all of the limitations on plaintiff’s
 9 right upper extremity noted in the ALJ’s residual functional capacity assessment.
 10 (AR 12-13, 350). In response, the vocational expert testified that a claimant with
 11 the stated limitations could still perform the job of host, usher or information
 12 clerk. (AR 351-54). The vocational expert’s testimony, at least with respect to the
 13 jobs of host and information clerk, constitutes substantial evidence supporting the
 14 ALJ’s determination that plaintiff could perform such jobs. Tackett, 180 F.3d at
 15 1101. The Court will not second-guess the ALJ’s reasonable interpretation of
 16 such evidence, even if such evidence could give rise to contrary inferences.

17 Accordingly, a reversal or remand on this basis is not warranted.

18 **C. The ALJ Properly Considered the Medical Opinion Evidence**

19 Plaintiff contends that reversal or remand is required because the ALJ failed
 20 to indicate whether he accepted or rejected the opinions of Dr. John S. Woodard,
 21 a neurologist and psychiatrist who conducted a consultative examination of
 22 plaintiff. (Plaintiff’s Motion at 6-7). Specifically, plaintiff contends that the ALJ
 23 inadequately considered Dr. Woodard’s findings that plaintiff (i) is in need of
 24 ongoing pain management; (ii) “is incapacitated for almost any kind of motor
 25 activity of his right major hand”; and (iii) “is capable of reaching, grasping,
 26 handling, fingering or feeling frequently with his left hand but not at all with his
 27 right hand.” (Plaintiff’s Motion at 6) (citing AR 313). The Court disagrees.

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1 **1. Additional Pertinent Facts**

2 On September 18, 2007, Dr. Woodard conducted a neurologic evaluation of
3 plaintiff. (AR 311-20). In his narrative report, Dr. Woodard summarized
4 plaintiff's functional limitations as follows:

5 [Plaintiff] is in need of an ongoing pain management program.
6 He is incapacitated for almost any kind of motor activity of his right
7 major hand. There is no incapacity for standing or walking, bending,
8 stooping or squatting. He should be able to lift and carry 20 pounds
9 occasionally and 10 pounds frequently since this depends entirely on
10 his left hand. He is capable of reaching, grasping, handling, fingering
11 or feeling frequently with his left hand but not at all with his right
12 major hand.

13 (AR 313). In a medical source statement attached to Dr. Woodard's report, Dr.
14 Woodard checked boxes indicating that plaintiff could occasionally reach
15 overhead and in all other directions with his right hand. (AR 316).

16 In the decision, the ALJ thoroughly summarized all of the medical treatment
17 and opinion evidence, as well as testimony of plaintiff and the vocational expert at
18 the February 6, 2008, administrative hearing. (AR 13-16). With respect to the Dr.
19 Woodard's neurologic evaluation of plaintiff, the ALJ stated as follows:

20 The evidence supports that [plaintiff] could do work adapted to
21 one armed light limitations. I have given great weight to the
22 consultative, Board eligible neurologist and psychiatrist, John
23 Woodard, M.D., (Exhibit 9F, pp. 1-10 [AR 311-320]). Dr. Woodard,
24 reviewed [plaintiff's] entire medical file, interviewed [plaintiff],
25 observed [plaintiff] and completed a neurological examination. Dr.
26 Woodard described a fairly normal and benign examination in all
27 areas except for [plaintiff's] right upper extremity. Upon evaluation
28 of the right upper extremity he reported the following: [plaintiff] had

1 restricted motor limitation of the right upper extremity. He had good
2 right upper shoulder action, but all of the muscles of the right upper
3 extremity were weak and atrophic, most severely peripherally.
4 [Plaintiff] had no capacity for flexion of the wrist and no functional
5 motion of the digits of the right hand except for minimal use of the
6 thumb. Triceps strength was judged to be 2 on a scale of one to five
7 and biceps were judged to be four out of five. Dr. Woodard
8 diagnosed [plaintiff] with right side brachioplexus injury, secondary
9 from a stab wound and regional pain syndrome. He concluded that
10 [plaintiff] would be in need of [an] ongoing pain management
11 program and gave him the following functional limitations. He
12 thought [plaintiff] had no incapacity for sitting, standing, walking,
13 stooping, bending, or squatting. He opined that [plaintiff] should be
14 able to lift and or carry 20 pounds occasionally and 10 pounds
15 frequently, depending entirely on his left hand. He concluded that
16 [plaintiff] could reach, grasp, handle, finger, or feel frequently with
17 his left hand but not at all with his right hand (Exhibit 9F, pp. 1-3
18 [AR 311-13]).

19 Dr. Woodard's conclusions are given great weight because they
20 are consistent with [plaintiff's] treatment records, [plaintiff's]
21 admitted activities, and the findings of the State Agency review
22 physicians (Exhibit 5F [AR 212-19, 220]).
23 (AR 14-15).

24 **2. Pertinent Law**

25 In Social Security cases, courts employ a hierarchy of deference to medical
26 opinions depending on the nature of the services provided. Courts distinguish
27 among the opinions of three types of physicians: those who treat the claimant
28 ("treating physicians") and two categories of "nontreating physicians," namely

1 those who examine but do not treat the claimant (“examining physicians”) and
 2 those who neither examine nor treat the claimant (“nonexamining physicians”).
 3 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (footnote reference omitted). A
 4 treating physician’s opinion is entitled to more weight than an examining
 5 physician’s opinion, and an examining physician’s opinion is entitled to more
 6 weight than a nonexamining physician’s opinion.⁵ See id. In general, the opinion
 7 of a treating physician is entitled to greater weight than that of a non-treating
 8 physician because the treating physician “is employed to cure and has a greater
 9 opportunity to know and observe the patient as an individual.” Morgan v.
 10 Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir.
 11 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

12 The treating physician’s opinion is not, however, necessarily conclusive as
 13 to either a physical condition or the ultimate issue of disability. Magallanes v.
 14 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d
 15 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician’s opinion is not
 16 contradicted by another doctor, it may be rejected only for clear and convincing
 17 reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal
 18 quotations omitted). The ALJ can reject the opinion of a treating physician in
 19 favor of a conflicting opinion of another examining physician if the ALJ makes
 20 findings setting forth specific, legitimate reasons for doing so that are based on
 21 substantial evidence in the record. Id. (citation and internal quotations omitted);
 22 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by
 23 setting out detailed and thorough summary of facts and conflicting clinical
 24 evidence, stating his interpretation thereof, and making findings) (citations and
 25 quotations omitted); Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite

27 ⁵Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to
 28 draw bright line distinguishing treating physicians from non-treating physicians; relationship is
 better viewed as series of points on a continuum reflecting the duration of the treatment
 relationship and frequency and nature of the contact) (citation omitted).

1 “magic words” to reject a treating physician opinion – court may draw specific
 2 and legitimate inferences from ALJ’s opinion). “The ALJ must do more than offer
 3 his conclusions.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). “He
 4 must set forth his own interpretations and explain why they, rather than the
 5 [physician’s], are correct.” Id. “Broad and vague” reasons for rejecting the
 6 treating physician’s opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599,
 7 602 (9th Cir. 1989). These standards also apply to opinions of examining
 8 physicians. See Andrews v. Shalala, 53 F.3d 1035, 1042-44 (9th Cir. 1995).

9 **3. Analysis**

10 Plaintiff’s allegation that the ALJ “failed to indicate whether he accepted or
 11 rejected” Dr. Woodard’s opinions is belied by the record. As noted above, the
 12 ALJ specifically stated that he gave “great weight” to the opinions expressed in
 13 the consultative neurological examination, as they were consistent with plaintiff’s
 14 treatment records, plaintiff’s own testimony, and other medical opinion evidence.
 15 (AR 14, 15). In any event, the ALJ was obligated to provide an explanation only
 16 if he rejected “significant probative evidence.” See Vincent v. Heckler, 739 F.2d
 17 1393, 1394-95 (9th Cir. 1984) (citation omitted). Plaintiff fails to identify any
 18 specific opinion expressed by Dr. Woodard that constitutes significant or
 19 probative evidence that is not already accounted for in the ALJ’s residual
 20 functional capacity assessment.

21 The Court rejects any suggestion that the ALJ erroneously rejected
 22 particular limitations expressed in Dr. Woodard’s opinions. Here, the ALJ’s
 23 residual functional capacity assessment virtually mirrors the limitations identified
 24 by Dr. Woodard with one exception. The ALJ determined that plaintiff could
 25 “occasionally reach overhead and in all directions with the right hand. . . .” (AR
 26 13). In contrast, in one portion of his report, Dr. Woodard opined that plaintiff
 27 “could reach . . . frequently with his left hand but not at all with his right hand.”
 28 (AR 15) (citing AR 313) (emphasis added). Although Dr. Woodard’s isolated

statement that plaintiff could reach “not at all with his right hand” suggests that plaintiff is completely unable to use his right upper extremity, the ALJ discusses additional evidence that suggests otherwise. The ALJ noted that Dr. Woodard’s examination reflected that plaintiff “had good right upper shoulder action,” and retained some bicep and tricep strength. (AR 15) (citing AR 312). Also, as noted above, Dr. Woodard indicated in his medical source statement that plaintiff retained the ability to occasionally reach overhead and in all other directions with his right hand. (AR 316). It was the ALJ’s sole province to resolve any conflict in the medical opinion evidence. In addition, to the extent the ALJ did not expressly reject Dr. Woodard’s opinions regarding plaintiff’s limitations on his ability to reach with his right hand, such a conclusion can be inferred from the ALJ’s thorough analysis of the pertinent facts and evidence, and detailed findings regarding residual functional capacity. Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out detailed and thorough summary of facts and conflicting clinical evidence, stating his interpretation thereof, and making findings) (citations and quotations omitted); Magallanes v. Bowen, 881 F.2d 747, 751, 755 (9th Cir. 1989) (same; ALJ need not recite “magic words” to reject a treating physician opinion – court may draw specific and legitimate inferences from ALJ’s opinion).

Accordingly, a reversal or remand on this basis is not warranted.

D. The ALJ Posed a Complete Hypothetical Question to the Vocational Expert

Plaintiff contends that a reversal or remand is appropriate because the ALJ erroneously omitted from his hypothetical question posed to the vocational expert at the February 6, 2008 supplemental hearing the opinions from Dr. Woodard that plaintiff “is incapacitated for almost any kind of motor activity of his right major hand and . . . is capable of reaching, grasping, handling, fingering or feeling

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1 frequently with his left hand but not at all with his right hand.” (Plaintiff’s Motion
2 at 8). The Court disagrees.

3 A hypothetical question posed by an ALJ to a vocational expert must set out
4 all the limitations and restrictions of the particular claimant. Light, 119 F.3d at
5 793 (citing Andrews, 53 F.3d at 1044); Embrey v. Bowen, 849 F.2d 418, 422 (9th
6 Cir. 1988) (“Hypothetical questions posed to the vocational expert must set out *all*
7 the limitations and restrictions of the particular claimant”) (emphasis in
8 original; citation omitted). However, an ALJ’s hypothetical question need not
9 include limitations not supported by substantial evidence in the record.
10 Osenbrock, 240 F.3d at 1163-64 (citation omitted).

11 As noted above, the ALJ included in the hypothetical question posed to the
12 vocational expert evidence of a complete inability to “handle, finger, feel, or push
13 and pull with the right upper extremity or hand,” which accounts for Dr.
14 Woodard’s opinion that plaintiff is precluded from “grasping, handling, fingering
15 or feeling . . . with his right hand.” (AR 313, 350). In addition, as discussed
16 above, the ALJ properly rejected any evidence that plaintiff was completely unable
17 to reach with his right hand. Accordingly, the ALJ properly omitted such evidence
18 from the hypothetical question.

19 Therefore, a remand or reversal on this basis is not warranted.

20 **V. CONCLUSION**

21 For the foregoing reasons, the decision of the Commissioner of Social
22 Security is affirmed.

23 LET JUDGMENT BE ENTERED ACCORDINGLY.

24 DATED: May 10, 2010

25 /s/

26 Honorable Jacqueline Chooljian
27 UNITED STATES MAGISTRATE JUDGE
28